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Client Alert

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Triple P Director Eligibility

On April 4, 2020, the Small Business Administration ("SBA") required lenders to certify, as part of the ETrans system, that a director, officer or 20% shareholder of the lender was not associated with the applicant. The SBA was reading into the Paycheck Protection Program ("Triple P") rules that were a carryover from the 7(a) program. Presumably, under that view, spouses and children of directors who were part of an applicant also rendered the applicant ineligible. The history of the SBA's position and the efforts to undo it are set forth below:

1. Both the CARES Act and the SBA's regulations thereunder are silent on loans to directors. On Friday, April 3, 2020, banks were processing director business loans.

2. At that time, the borrower application, the lender application and the lender agreement were silent on this issue. However, the first draft of the lender application that came out late Friday April 4, 2020 included a certification by the lender that "None of the Lender's Associates, including but not limited to its employees, officers, directors, or substantial stockholders has a financial interest in the Applicant." For this purpose, "Associate of a Lender is an officer, director, key employee, or holder of 20% or more of the value of the Lender's stock or debt instruments."

3. The SBA's view was that it included a similar certification in other lender applications and the ETrans system should include a question along these lines.

4. I spoke to the General Counsel ("GC") of the Independent Community Bankers of America ("ICBA") on Sunday, April 6, 2020. He agreed that this was a holdover from the 7(a) program. He called the head of the SBA.

5. In a banker call that Sunday morning (April 5, 2020) (as reported by the Oklahoma Bankers Association), Secretary Mnuchin said there is nothing that prohibits a bank from making these loans. Yet, no guidance was released.

6. ICBA and American Bankers Association, among others, had a meeting with Treasury on Tuesday, April 8, 2020. Treasury said let them think about it.

7. On Thursday, April 10, 2020, a number of congressmen spoke with President Trump's Chief of Staff about banks being able to issue Triple P loans to their directors. White House Chief of Staff, Mark Meadows, reportedly reached out to Secretary Mnuchin about this issue.

8. On Friday, April 11, 2020, ICBA's GC said he is still waiting on written advice, one way or the other.

Nine days after setting bad policy, the SBA has now reversed itself. If a director of a bank owns less than 30% of the stock of the bank or bank holding company, the director's involvement with an applicant (and presumably the director's associates) would not render that applicant ineligible for a loan at that lender.

For many, the change is too little too late. Fearing that the Triple P would run out of money, bankers sought "back scratch" arrangements whereby other banks would pick up the applications from their directors and vice versa. Absent such an accommodation, bank directors were left in a "no win" choice. They could either resign from their bank or seek to cut ties with the applicant. Thus, in the throes of what may be the country's greatest economic downturn ever, certainly the fastest downturn to occur, banks were potentially at risk of losing the business acumen of good directors. Alternatively, directors who are deeply involved with their community, their religious institutions, and nonprofits, were put in a position where they might need to terminate their positions with such entities in order to enable those not-for-profit organizations to obtain financing.

For what is in essence a grant program designed to get dollars into the hands of the broadest number of people possible, but especially the small business community, the SBA's antipathy toward bank directors was just another example of an ill-thought-out "borrowing" of pre-existing 7(a) rules to the Triple P.

The SBA will still bar director-related applicants who own 30% or more, are officers or are "key employees" of the lender. Why 30%? Why include such a restriction at all?

The basis for the SBA change in policy contradicts the need for such restrictions. Specifically, the SBA stated:

> The Administrator recognizes that, unlike other SBA loan programs, the financial terms for PPP Loans are uniform for all borrowers, and the standard underwriting process does not apply because no creditworthiness assessment is required for PPP Loans. Consequently, there is no meaningful risk of underwriting bias or below-market rates and terms.

Nonetheless, the SBA has determined that there should be limits around its ineligibility carve-out.

Lenders are admonished not to show "favoritism" in processing time or prioritization. In addition, lenders are required to comply with any applicable law, such as Regulation O's prior approval requirement.

In short, the SBA has now adopted a meaningful carve-out to its own restrictions on the eligibility of director-related applicants. Like much of the Triple P itself, the timing and process has left much to be desired.

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